80-1714

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No._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ROBERT G. BRITTON, Commissioner,
Alabama Department of Corrections, and
JOSEPH OLIVER, Warden, Holman Prison,

Petitioners

v.

JOHN LOUIS EVANS, III,

Respondent

APPENDIX

TO PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CHARLES A. GRADDICK
ATTORNEY GENERAL OF
ALABAMA

EDWARD E. CARNES
ASSISTANT ATTORNEY
GENERAL OF ALABAMA

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64 North Union Street
Montgomery, Alabama 36130
(205) 834-5150

ATTORNEYS FOR PETITIONERS

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APPENDIX A

UNITED STATES COURT OF APPEALS

For The Fifth Circuit

No. 79-2674

D. C. Docket No. CA-79-0200-H

JOHN LOUIS EVANS, III,

Petitioner-Appellant,

versus

ROBERT G. BRITTON, Commissioner, Alabama Board of Corrections, and JOSEPH OLIVER, Warden, Holman Prison,

Respondent-Appellees.

Appeal from the United States District Court for the Southern District of Alabama

Before VANCE and SAM D. JOHNSON, Circuit Judge, and THOMAS*, District Judge.

J U D G M E N T

This cause came on to be heard on the

transcript of the record from the United States District Court for the Southern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed:

It is further ordered that respondents-appellees pay the costs on appeal to be taxed by the Clerk of this Court.

October 15, 1980

DANIEL HOLCOMBE THOMAS, District Judge, dissenting:

Issued as Mandate:

[a copy of the Court's opinion, reproduced herein as Appendix____and Appendix_____, was attached]

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*United States District Judge for the Southern District of Alabama, sitting by designation.

APPENDIX B

John Louis EVANS, III,

Petitioner-Appellant,

v.

Robert G. BRITTON, Commissioner, Alabama Board of Corrections, and Joseph Oliver, Warden, Holman Prison,

Respondents-Appellees.

No. 79-2674.

United States Court of Appeals, Fifth Circuit.

March 9, 1981.

On Petition for Rehearing

[Opinion Oct. 15, 1980, 628 F. 2d 400 (5th Cir. 1980)]

Before VANCE and SAM D. JOHNSON, Circuit Judges and THOMAS*, District Judge.

*District Judge of the Southern District of Alabama, sitting by designation.

PER CURIAM:

In its petition for rehearing, the state raises two points which merit further comment.

The state first argues that the panel ignored the effect of Evans' guilty plea. The state maintains that, under Alabama law, the guilty plea was effective, and forecloses on any doubt regarding the fairness of Evans' trial. The initial difficulty with the state's position is that Evans' guilty plea was not accepted by the trial court. The Alabama Supreme Court reached this specific point in dealing with Evans' codefendant Ritter. Evans and Ritter both entered identical pleas, Evans v. State, 361 So. 2d 654, 655-56 (Ala. Crim. App. 1977). On appeal, the Alabama Supreme Court adopted the statement of facts of the Court of Criminal Appeals, affirmed as to Evans, but remanded to the Court of Criminal Appeals as to Ritter, Evans v. State, 361 So. 2d

666 (Ala. 1978), cert. denied, 440 U.S. 930, 99 S. Ct. 1267, 59 L. Ed. 2d 486 (1979). On remand the Court of Criminal Appeals reinstated the conviction, Ritter v. State, 375 So. 2d 266 (Ala. Crim. App. 1978). In affirming, the Supreme Court described the events as follows:

> Nevertheless, against the advice of his attorney, Ritter entered a guilty plea to the robbery and intentional killing of Nassar. (He also pled guilty to the robbery of a Radio Shack in Mobile.) The trial judge, however, did not accept the guilty plea but instead set the matter for presentation to a jury.

Ex parte Ritter, 375 So. 2d 270, 276 (Ala. 1979), vacated, ___ U.S. ___, 100 S. Ct. 3044, 65 L. Ed. 2d 1133 (1980) (emphasis added). Since Ritter's plea was identical to Evans', it is clear that, under Alabama law as interpreted by the Alabama

Supreme Court, Evan's plea of guilty was not accepted.[1]

The instruction which the trial judge gave to the jury makes it clear that the rejected guilty plea was not determinative.

> I can only tell you that in reaching your verdict, you may not take the simple approach and say, if the Defendant admits he did it, we go no further. You must reach a verdict that is supported by all of the creditable evidence that has been presented to you in this case.... A Defendant in Alabama is presumed to be innocent, and this presumption of innocence attends

[1]Footnote 1 and all other footnotes for this opinion are reproduced seriatim at the end of this opinion. See pp. 13a - 14a, infra.

> him as a matter of evidence until the State has, by the evidence, proved him guilty beyond all reasonable doubt. That is the burden that is on the State of Alabama. They must prove the Defendant guilty beyond all reasonable doubt.... Until and unless the State proves the Defendant guilty beyond a reasonable doubt, you cannot convict him.

The state took no exception to these instructions at trial. It therefore cannot now be heard to argue that "a valid guilty plea conclusively establishes all elements of the offense charged and removes any issue of factual guilt."[2] We also observe that the Alabama courts themselves considered the merits of Evans' contention that the death penalty statute was unconstitutional. Contrary to the state's position, the Alabama courts were

no more willing than we to regard the rejected guilty plea as disposing of the constitutional issue. Evans v. State, 361 So. 2d at 662; Evans v. State, 361 So. 2d at 667.

Finally, even if all of the state's contentions were allowed, it would not have the legal result for which it argues. A guilty plea waives constitutional challenges to proceedings before the plea is entered, not to events afterwards. "The Brady trilogy announced the general rule that a guilty plea, intelligently and voluntarily made, bars the later assertion of constitutional challenges to the pretrial proceedings." Lefkowitz v. Newsome, 420 U.S. 283, 288, 95 S. Ct. 886, 889, 43 L. Ed. 2d 196 (1975).

> We thus reaffirm the principle recognized in the Brady trilogy: a guilty plea represents a break in the chain of events which has

> preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.

Tollett v. Henderson, 411 U.S. 258, 267, 93 S. Ct. 1602, 1608, 36 L. Ed. 2d 235 (1973).

The rule in this circuit is the same, as is that of Alabama.

> This Court has consistently held that a guilty plea voluntarily and understandingly made waives all non-jurisdictional defects in the prior proceedings against the accused.

United States v. Boniface, 631 F. 2d 1228, 1229 (5th Cir. 1980); accord Stanley v. Wainwright, 604 F. 2d 379, 380 n. 1 (5th Cir. 1979), cert. denied, ___ U.S. ___, 100 S. Ct. 3019, 65 L. Ed. 2d 1118 (1980).

> A guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a person admits in Open Court that he is in fact guilty of the crime or crimes with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.

Harris v. State, 367 So. 2d 524, 533 (Ala. Crim. App. 1978), cert. denied, 367 So. 2d 534 (Ala. 1979).

Thus, even if Evans' guilty plea had been accepted, it would have waived his right to challenge only defects in prior

proceedings. It would also have waived his right to trial. However, a guilty plea has never been held to waive future defects if the case is nevertheless tried.

The state's second point is that, in view of what it contends is the overwhelming evidence of Evans' guilt, no defects in the statute or the trial procedure, no matter how grave, could possibly have prejudiced him. However persuasive this argument might otherwise be, it has been foreclosed by the Supreme Court. In analyzing the Alabama statute in question, the Court stated as follows:

> But in every case they [the defects in the statute] introduce a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case.

Beck v. Alabama, ___ U.S. ___, ___, 100 S. Ct. 2382, 2392, 65 L. Ed. 2d 392 (1980). "Every case" means even cases in which the

defendant tried to plead guilty. The Court has established that there are "constitutional error[s] of the first magnitude and no amount of showing of want of prejudice would cure [them]." Davis v. Alaska, 415 U.S. 308, 318, 94 S. Ct. 1105, 1111, 39 L. Ed. 2d 347 (1974). Unless the Supreme Court changes its language in Beck, we must conclude that the defects in the Alabama death statute fall into this category.

We extend our opinion. In all other respects the petition for rehearing is denied.

District Judge THOMAS continues to dissent for the reasons previously stated in the panel opinion.

[Footnotes begin on next page.]

[1]Evans' and Ritter's pleas were not accepted because of language in the Alabama Death Penalty and Life Imprisonment Without Parole Act, Ala. Code tit. 13, §§ 11-1 et seq. Section 13-11-2(a) allows a death penalty to be imposed "[i]f a jury finds the defendant guilty...." This language was interpreted in Prothro v. State, 370 So. 2d 740 (Ala. Crim. App. 1979), to require a jury trial even if the defendant sought to plead guilty. Note the specific reference to the Evans and Ritter trial:

> The Act, ex vi termini, and the Alabama Legislature, ex proprio vigore, have set forth not only the only crimes for which one may be punished by death or by life imprisonment without parole, but also the only method by which either punishment may be lawfully imposed. Neither the death sentence nor a sentence to life imprisonment without parole is permissible, whether by agreement of all concerned or not, in the absence of a verdict of a jury finding the defendant guilty and fixing his punishment at death.
>
> We must come to the conclusion that in Alabama the constitutional and statutory law does not permit the trial court, without a jury, to try or fix the punishment in a capital case.... In Alabama, under the Death Penalty and Life Imprisonment Without Parole Act, he cannot waive a jury trial, even with the consent of the prosecution and the consent of the trial court; he cannot by such a maneuver avoid the legal necessity for a jury to try the facts, find defendant guilty or not

> guilty, and if found guilty to fix his punishment at death. Such was the procedure in the Evans and Ritter v. State, supra, in which defendants pleaded guilty and requested the death penalty.

Id. at 746 (emphasis in original).

[2]Under Alabama law, it would not be possible to accept a guilty plea and then hold a full trial. "The rule of law is that a plea of guilty when accepted and entered by the court is a conviction...." Ex parte Sankey, 364 So. 2d 362, 363 (Ala. 1978), cert. denied, 440 U.S. 964, 99 S. Ct. 1513, 59 L. Ed. 2d 779 (1979) (emphasis added). Indeed, it is doubtful as a constitutional matter whether a guilty plea could ever be held to establish actual guilt, but still to require a full trial. In North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970) a defendant whose guilty plea had been accepted sought to argue the converse position, that his plea had waived trial but had not admitted factual guilt. The Supreme Court rejected this attempt to split the dual function of the guilty plea.

APPENDIX C

John Louis EVANS, III,
Petitioner-Appellant,

v.

Robert G. BRITTON, Commissioner, Alabama Board of Corrections, and Joseph Oliver, Warden, Holman Prison, Respondents-Appellees.

No. 79-2674.

United States Court of Appeals,
Fifth Circuit.

Oct. 15, 1980

Before VANCE and SAM D. JOHNSON, Circuit Judges, and THOMAS,* District Judge.

PER CURIAM:

John Louis Evans, III, was convicted of capital murder by a jury and was sentenced to death in an Alabama state court. In his 28 U.S.C. § 2254 petition

*United States District Judge for the Southern District of Alabama, sitting by designation.

for habeas corpus relief, denied by the district court, 472 F. Supp. 707, he alleges that because the Alabama death penalty statute, Code of Ala. § 13-11-2 (1975), deprived him of due process of law and equal protection and constituted cruel and unusual punishment in violation of the United States Constitution, his conviction must be reversed. The Alabama statute precludes the jury from considering lesser included offenses in capital cases; thus it gives the jury the option of convicting a defendant of the capital offense or of acquitting him.

In Beck v. Alabama, ___ U.S. ___, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980), the United States Supreme Court was presented with a challenge to the Alabama death penalty statute and held that a death sentence could not constitutionally be imposed after a jury verdict of guilt of a capital offense, when the jury was not permitted to consider

a verdict of guilt of a lesser included non-capital offense, and when the evidence would have supported such a verdict. The state argues that Beck does not control this case. In Beck, the state conceded that Beck's testimony would have entitled him to an instruction on a lesser included offense, absent the statutory prohibition. The state says that there was no evidence adduced by Evans which would require instruction on a lesser offense even if such instruction were not prohibited. It urges that we certify to the Alabama Supreme Court whether the constitutionally offensive portions of the Alabama Capital Punishment Statute may be severed from the remainder of the Statute. It reasons that Evans' conviction should be allowed to stand with the preclusion clause severed from the Statute.

We cannot reconcile this position with the Supreme Court's language in Beck:

In the final analysis the difficulty with the Alabama statute is that it interjects irrelevant considerations into the factfinding process, diverting the jury's attention from the central issue of whether the State has satisfied its burden of proving beyond a reasonable doubt that the defendant is guilty of a capital crime. Thus, on the one hand, the unavailability of the third option of convicting on a lesser included offense may encourage the jury to convict for an impermissible reason—its belief that the defendant is guilty of some serious crime and should be punished. On the other hand, the apparently mandatory nature of the death penalty may encourage it to acquit for an equally impermissible reason—that, whatever his crime, the defendant does

not deserve death. In any particular case these two extraneous factors may favor the defendant or the prosecution or they may cancel each other out. But in every case they introduce a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case.

___ U.S. at ___, 100 S. Ct. at 2392 (emphasis added).

Obviously we cannot conclude that Evans' trial under an unconstitutional statute was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 828, 17 L. Ed. 2d 705 (1967). The peculiar nature of the offensive statute would infect virtually every aspect of any capital defendant's trial from beginning to end. Each and every decision concerning trial strategy, the selection of evidence to use and its

presentation, the argument of counsel, objections, requests for charges, all were inevitably influenced by the brooding omnipresence of the unconstitutional edict—Evans must either be sentenced by the jury tc die or he must be set free.

The state says that harm to Evans is sheer speculation because he did not even undertake to prove a lesser offense. It seems to us, however, that it offends the most fundamental notions of fairness for the state first to tell Evans that there is no lesser offense and then later urge that his death sentence should be upheld because he failed to present evidence which would prove a lesser included offense.

We will not speculate as to whether if tried under a constitutional statute Evans will adopt some different strategy or whether he can present evidence of some less serious offense. We also will not speculate as to whether the Supreme Court

of Alabama can judicially tailor the state statute to pass constitutional muster. We decline to certify his case to the state court because, as to Evans, certification would be nothing more than an empty academic exercise. The infirmity in his trial cannot be excised retroactively. Evans may not be executed until and unless he be tried, convicted and sentenced in a manner that at least meets minimum constitutional standards. His trial, conviction and sentence now before us was under a statute which the Supreme Court says introduces in every case a level of uncertainty and unreliability that cannot be tolerated.

The judgment of the district court denying relief under 28 U.S.C. § 2254 must be reversed.

REVERSED.

DANIEL HOLCOMBE THOMAS, District Judge, dissenting:

This writer respectfully dissents. I would certify to the Alabama Supreme Court the question of whether the preclusion clause of the Alabama Capital Punishment Statute may be severed from the remainder of the Statute.

The State of Alabama has filed a motion requesting that the certification be granted. I think that the question of severability is a question of Alabama law and that certification to the Alabama Supreme Court should be granted.

I dissent.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOHN LOUIS EVANS, III,	X	
	X	
Appellant	X	
	X	
v.	X	No. 79-2674
	X	
ROBERT G. BRITTON, et al.,	X	
	X	
	X	
Appellees	X	

APPELLEES' MOTION TO CERTIFY QUESTIONS OF ALABAMA LAW TO THE ALABAMA SUPREME COURT

Appellees in the above-styled cause move this Honorable Court to certify to the Alabama Supreme Court state law questions which will avoid in whole or part the federal constitutional issues involved in this appeal or at least substantially modify the nature of the federal constitutional issues. Further specification and grounds for this motion are as follows:

1. The Alabama law questions which

should be certified to the Alabama Supreme Court are these questions (hereafter referred to as "the specified state law questions"), or these questions in substance:

a. Is the preclusion clause which was ruled unconstitutional by the United States Supreme Court in Beck v. Alabama, No. 78-6621 (U.S. June 20, 1980), severable from the remainder of the Alabama Capital Punishment Statute?

b. In view of the decision in Beck v. Alabama, supra, is any other part of the Alabama Capital Punishment Statute due to be struck and severed from the remainder of the statute?

c. In view of the evidence at his trial would Appellant Evans have been entitled, as a matter of state law, to have the jury instructed on any lesser included non-capital offense had it not been for the existence of the preclusion

clause which was struck down in Beck v. Alabama, supra?

d. When he was arrested, before the grand jury, and at his trial, Evans repeatedly confessed his guilt of the capital offense for which he was convicted. He entered a guilty plea at arraignment and signed a written "Motion to Enter Guilty Plea" at his trial. At all stages of the prosecution, Evans asked that he be convicted and sentenced to death. What effect does that course of conduct have as a matter of state law — what rights and claims of error, if any, did Evans waive under state law?

e. In view of Beck v. Alabama, supra, is Evans now entitled, as a matter of state law, to have his conviction or sentence reversed?

f. Under the Alabama Capital Punishment Statute, what is the burden of proof to be applied by the trial court

judge to disputed factual issues, if any, at the sentence hearing?

g. Evans was convicted of the Code of Alabama 1975, § 13-11-2(a)(2) offense of robbery-intentional killing, and one of the aggravating circumstances that the trial court judge found and considered at the sentence hearing was the § 13-11-6(4) circumstance that the capital felony involved robbery. Was this finding a correct interpretation and application of the statute?

2. There are no clear controlling precedents in the decisions of the Alabama Supreme Court on the specified state law questions.

3. The resolution of the specified state law questions by the Alabama Supreme Court will avoid in whole or in part the federal constitutional issues involved in this appeal or will at least substantially modify the nature of the federal constitutional issues.

4. Until the specified state law questions are authoritatively determined by the Alabama Supreme Court, it is impossible to define precisely the federal constitutional issues presented in this appeal.

5. The proper, authoritative, and correct resolution of the specified state law questions vitally affects public policy of the State of Alabama and is a matter of great importance to numerous defendants and to all of the people of Alabama.

6. It is essential that the state and federal courts speak with one voice as to the specified state law questions, and the authoritative and final voice on Alabama law is the Alabama Supreme Court.

7. Alabama law expressly provides for certification of state law questions to the Alabama Supreme Court from federal

courts. Alabama Constitution, Article VI §140(b)(3), as amended by Amendment No. 328; Alabama Rule of Appellate Procedure 18.

WHEREFORE, Appellees respectfully request this Court to certify the specified state law questions to the Alabama Supreme Court, or in the alternative, to order the parties to submit to this Court a proposed agreed statement of facts and certificate of state law questions to be transmitted to the Alabama Supreme Court.

Respectfully submitted,

CHARLES A. GRADDICK
Alabama Attorney General
By-

/s/ Ed Carnes
Assistant Alabama Attorney General

COUNSEL FOR APPELLEES

CERTIFICATE OF SERVICE

I certify that I have served a copy of this motion on Appellant Evans by mailing copies to his attorneys at the following addresses:

Honorable John L. Carroll
Honorable Dennis N. Balske
1001 South Hull Street
Montgomery, AL 36104

Honorable Steven Reiss
255 M Street, N.W.
Washington, D.C. 20037

Done this the 30th day of June, 1980.

/s/ Ed Carnes
Assistant Alabama Attorney General

ADDRESS:

Assistant Attorney General Ed Carnes
Alabama Attorney General's Office
250 Administrative Bldg.
64 No. Union Street
Montgomery, AL 36130

(205) 834-5150

APPENDIX E

ALABAMA RULE OF APPELLATE PROCEDURE 18 CERTIFIED QUESTIONS FROM FEDERAL COURTS

(a) WHEN CERTIFIED. When it shall appear to a court of the United States that there are involved in any proceeding before it questions or propositions of law of this State which are determinative of said cause and that there are no clear controlling precedents in the decisions of the Supreme Court of this State, such federal court may certify such questions or propositions of law of this State to the Supreme Court of Alabama for instructions concerning such questions or propositions of state law, which certified question the Supreme Court of this State, by written opinion, may answer.

(b) JURISDICTION. Questions or propositions of law referred to in subdivision (a) hereof shall be certified for answer to the Supreme Court.

(c) METHOD OF INVOKING RULE. The provisions of this rule may be invoked by any of the federal courts upon its own motion or upon the suggestion or motion of any interested party when approved by such federal court.

(d) CONTENTS OF CERTIFICATE. The certificate provided for herein shall contain the style of the case, a statement of facts showing the nature of the cause and the circumstances out of which the questions or propositions of law arise and the question of law to be answered.

(e) PREPARATION OF CERTIFICATE. The certificate shall be certified to the Supreme Court by the clerk of such federal court and under its official seal. The Supreme Court may, in its discretion,

require the original or copies of all or any portion of the record before the federal court to be filed with said certificate where, in its opinion, such record may be necessary in the determination of said certified question.

(f) COSTS. The costs of the proceedings shall be equally divided between the parties unless otherwise ordered by the Supreme Court.

(g) BRIEFS AND ARGUMENT. The appellant or moving party in the federal court shall file and serve upon its adversary its brief on the question certified within 28 days (4 weeks) after the filing of said certificate in the Supreme Court. The appellee or responding party in the federal court shall file and serve upon its adversary its brief within 21 days (3 weeks) after the receipt of the appellant's or moving party's brief and a reply brief may be filed within 7 days (1 week) thereafter.

(h) ORAL ARGUMENT. Oral argument may be granted upon application and, unless for good cause shown the time be enlarged by special order of the court prior to the hearing thereon, the parties shall be allowed the same time as in other causes on the merits.

APPENDIX F

January 27, 1981

Honorable Gilbert F. Ganucheau
Clerk's Office
United States Court of Appeals
For the Fifth Circuit
600 Camp Street
New Orleans, Louisiana 70130

Re: Evans v. Britton
(No. 79-2674)

Dear Mr. Ganucheau:

On November 19, 1980, I filed Appellees' Petition for Rehearing with a Suggestion for Rehearing En Banc in the above-styled case. Since that date, there have been two developments which should be brought to the Court's attention, because they directly affect this case and the issues raised in the pending rehearing petition.

The first development occurred on December 19, 1980, when the Alabama Supreme Court rendered its decision in Gilbert Franklin Beck v. State, No. 77-530 (Ala. 1980) (on remand from the United States

Supreme Court). A copy of the Alabama Supreme Court's opinion is enclosed. That decision and the opinion which accompanied it authoritatively answer the first of the four state law questions listed on pp. 2-3 of our rehearing petition. See, Gilbert Franklin Beck v. State, supra, slip. op. at 24-27. The Alabama Supreme Court has not yet answered the other three state law questions which are listed on p. 3 of our petition, but it soon will.

On January 9, 1981, the Alabama Supreme Court set a briefing and argument schedule in the case of Wayne Eugene Ritter v. State, No. 77-798 (Ala.). Oral argument is March 16, 1981, and a decision should follow soon thereafter. Ritter is the co-defendant of Evans, the appellant now before this Court in the above-styled case, and Ritter's appeal is now pending in the Alabama Supreme Court on remand

from the United States Supreme Court for further consideration in light of Beck v. Alabama, 100 S. Ct. 2382 (1980). See, Ritter v. Alabama, 100 S. Ct. 3044 (1980).

The significance of the Alabama Supreme Court's January 9, 1981, order in the Ritter case is this: it means that the Alabama Supreme Court is in the process of addressing and will soon decide those three remaining state law issues which are set out on p. 3 of our rehearing petition in the present case. The facts involving co-defendants Evans and Ritter are the same, see, Evans and Ritter v. State, 361 So. 2d 666 (Ala. Cr. App. 1978); the issues raised are identical; and, Evans and Ritter are even represented by the same lead counsel (as is true of the State of Alabama in the two cases).

The answers which the Alabama Supreme Court gives in Ritter to those three sharply disputed state law questions will

either moot our pending petition for rehearing in the present case, or those answers will underscore the panel's error in reversing the district court in the present case. If the Alabama Supreme Court holds that Ritter is entitled to a new trial as a matter of state law, then appellees will concede that Evans is entitled to the same, and that concession will moot our rehearing petition and will dispose of the present case. If, on the other hand, the Alabama Supreme Court holds that Ritter is not entitled to a new trial because his guilty plea was valid as a matter of state law and had the effect of waiving all non-jurisdictional defects, then that holding will demonstrate the panel's error in totally ignoring Evans' identical guilty plea. See pp. 5-8 of our rehearing petition. It will demonstrate that, at the very least, the panel should have addressed the guilty plea issue.

For these reasons, appellees respectfully suggest that a ruling on Appellees' Petition for Rehearing with a Suggestion for Rehearing En Banc should be held in abeyance until the Alabama Supreme Court issues its decision in Wayne Eugene Ritter v. State, supra.

Thirty copies of this letter and its enclosure are enclosed for distribution to the Court.

Sincerely,

/s/ Ed Carnes

ED CARNES
Assistant Attorney
General

EC:bb

Enclosure

cc: Honorable John L. Carroll
Honorable Dennis N. Balske
1001 South Hull Street
Montgomery, Alabama 36104

Honorable Steven A. Reiss
2555 M Street, N.W.
Washington, D.C. 20037

APPENDIX G

IN THE UNITED STATES

COURT OF APPEALS

FOR THE FIFTH CIRCUIT

JOHN LOUIS EVANS, III,	X	
	X	
Petitioner-Appellant	X	
	X	
vs.	X	NO. 79-2674
	X	
ROBERT G. BRITTON, et al.,	X	
	X	
Respondents-Appellees	X	

MOTION FOR CLARIFICATION
OF EN BANC PETITION STATUS

Respondents-Appellees [hereinafter referred to as "the State of Alabama"] move for an order clarifying the status of their previously filed Suggestion for a Rehearing En Banc. As the basis for this motion, the following is shown:

1. A panel opinion adverse to the State of Alabama was entered on October 15, 1980.

2. On November 19, 1980 (following a timely extension to that date), the State

of Alabama filed a Petition for Rehearing with a Suggestion for Rehearing En Banc.

3. The suggestion for Rehearing En Banc was filed jointly with the Petition for Rehearing, because prior to filing it the undersigned attorney for the State of Alabama was informed by one of this Court's deputy clerks that such a practice was not only permissible but was actually preferred. (It was only afterwards that Local Rule 16.3 was amended to prohibit incorporating the suggestion for rehearing en banc into the petition for rehearing before the panel.)

4. In a letter dated January 27, 1981, the State of Alabama requested that this Court hold in abeyance a ruling on its previously filed Petition for Rehearing with a Suggestion for Rehearing En Banc until the Alabama Supreme Court decides the case of Ritter v. State, 375 So.2d 270 (Ala. 1979), vacated and remanded,

_____U.S.____, 100 S. Ct. 3044, 65 L. Ed. 2d 1133 (1980), which is now pending before it on remand from the United States Supreme Court. The letter stated that the Alabama Supreme Court's pending decision in the Ritter case would either moot the State of Alabama's petition in this Court, or would underscore the errors which the panel had made concerning certain crucial issues of Alabama law.

5. On March 9, 1981, the panel issued a per curiam opinion which extended its original opinion, and which denied the Petition for Rehearing before the panel in all other respects.

6. Apparently, no order has yet been issued concerning the State of Alabama's Suggestion for a Rehearing En Banc. Despite diligent efforts by the undersigned attorney, including several telephone calls to both the New Orleans and the Atlanta Offices of the Clerk, he has been unable to determine the status of the

Suggestion for Rehearing En Banc.

7. The State of Alabama is not requesting that an immediate decision be made on the Suggestion for Rehearing En Banc, since the State still believes that such a decision should be held in abeyance until the Alabama Supreme Court issues its decision in the Ritter case, as discussed in paragraph 4 of this motion.

8. However, the State of Alabama does need to know whether its previously filed Suggestion for Rehearing En Banc is still pending, or is being held in abeyance as requested in its January 27, 1981 letter to this Court, or has been denied.

9. Since apparently no one in either office of the Clerk knows exactly what the present status of the State's Suggestion for Rehearing En Banc is, only this Court can inform the State of Alabama of that status.

WHEREFORE, for the foregoing reasons, the State of Alabama respectfully requests that this Court issue an order stating whether the State's previously filed Suggestion for Rehearing En Banc is still pending, is being held in abeyance or has been denied. In the alternative, the State of Alabama respectfully requests that this Court inform the Clerk's Office about the status of the Suggestion for Rehearing En Banc and direct the Clerk's Office to notify the parties of that status.

Respectfully submitted,

CHARLES A. GRADDICK
ALABAMA ATTORNEY GENERAL
By-

/s/ Ed Carnes
ED CARNES
Assistant Alabama
Attorney General

CERTIFICATE OF SERVICE

I certify that I have served copies of the foregoing Motion on Petitioner-Appellant by mailing copies, postage prepaid to his attorneys as follows:

Hon. John R. Carroll
Hon. Dennis N. Balske
1001 South Hull Street
Montgomery, AL 36104

Hon. Stephen A. Reiss
2555 M Street N.W.
Washington, D.C. 20037

Done this the 11th day of March, 1981.

/s/ Ed Carnes
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APPENDIX H

Mar. 20, 1981

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNIT B

No. 79-2674

JOHN LOUIS EVANS, III,

Petitioner-Appellant,

versus

ROBERT G. BRITTON, Commissioner,
Alabama Board of Corrections, and
JOSEPH OLIVER, Warden, Holman Prison,

Respondents-Appellees.

Appeal from the United States District Court
for the Southern District of
Alabama

O R D E R:

IT IS ORDERED that the appellees' motion for clarification of en banc petition status is denied.

/s/ Robert S. Vance
UNITED STATES CIRCUIT
Judge

APPENDIX I

John Louis EVANS, III, Petitioner,

v.

Robert G. BIRTTON, Commissioner, Alabama Board of Corrections, and Joseph Oliver, Warden, Holman Prison, Respondents.

Civ. A. No. 79-0200-H.

United States District Court,
S. D. Alabama, S. D.

June 11, 1979.

MEMORANDUM OPINION

HAND, District Judge.

The petitioner, presently incarcerated on death row at Holman Prison Unit under a death sentence imposed by the Circuit Court of Mobile County, brings this action seeking habeas corpus relief from such sentence pursuant to Title 28 U.S.C.A., § 2254. The facts leading up to the conviction of the petitioner have been set out by the Alabama Court of

Criminal Appeals in Evans v. State, 361 So. 2d 654, 655-62 (Ala. Cr. App. 1977), and need not be repeated here. The petitioner was convicted of capital murder by a jury in the Mobile County Circuit Court on April 26, 1977 and, following a presentence hearing on April 27, 1977, the trial judge accepted the death penalty sentence returned by the jury. In October of 1977 the conviction and sentence were affirmed by the Alabama Court of Criminal Appeals, id., and these decisions were affirmed by the Supreme Court of Alabama in May of 1978. Id. at 666. Evans filed a petition for a writ of certiorari in the United States Supreme Court on November 16, 1978, but the petition was denied on February 21, 1979. Evans v. Alabama, ___ U.S. ___, 99 S. Ct. 1267, 59 L. Ed. 2d 486 (1979) (Marshall & Brennan, JJ., dissenting). On March 1, 1979, the Alabama Supreme Court entered an order requiring that Evans be

executed in accordance with the sentence on April 6, 1979. On April 5, 1979 the United States Supreme Court, through Justice Rehnquist, stayed the scheduled execution in response to a next-friend application for habeas corpus filed by petitioner's mother. Evans v. Bennett, ___ U.S. ___, 99 S. Ct. 1481, 59 L. Ed. 2d 756 (1979) (Rehnquist, J.). This stay was later dissolved by a unanimous vote of eight members of the Court. Evans v. Bennett, ___ U.S. ___, 99 S. Ct. 1481, 59 L. Ed. 2d 756 (1979). The Alabama Supreme Court set a new execution date of April 27, 1979, which was stayed by this Court on April 20th pending the final adjudication on the merits of the habeas corpus petition presently before the Court.

The petitioner sets out two general grounds for habeas relief: the trial judge erred in failing or refusing to instruct the jury in his case on the elements

constituting a prima facie case of robbery; and the Alabama death penalty statute under which the petitioner was convicted and sentenced is unconstitutional. The Court is convinced that jurisdiction properly lies in this Court to consider these issues pursuant to Title 28 U.S.C.A. § 2254.

I.

The petitioner contends that the trial judge's failure to instruct the jury on the elements of robbery violated his right to due process of law. There is no question but that the jury was not so instructed, the oral charge of the trial judge reading in perinent part as follows:

> The charge against the defendants is that they did unlawfully, intentionally, and with malice aforethought, kill Edward Nassar during the course of a robbery. The law of Alabama provides that

anyone who, during the course of a robbery, intentionally kills the victim, is guilty of this offense, and the punishment for this offense is death by electrocution. . . Now, the State must prove that [the defendants] intentionally killed Mr. Nassar. Unless there is an actual or positive intent to kill, they are not guilty of the crime with which they are charged. The intentional killing is a willful killing, an act governed by the will of the individual committing the same. The indictment further charges that they committed the act with malice. Malice means hatred or hostility toward another. It doesn't necessarily mean a personal ill will. When associated with murder, or a killing of this kind, it means an unlawful act, willfully

done, without just cause or legal excuse. It is that mental state or condition which prompts one to do an unlawful act without legal justification. It has also been defined as that condition of mind which shows a heart, regardless of social duty, totally bent on mischief.

. . .

(Transcript, pp. 223-24). Evans and his co-defendant, Wayne Ritter, had three attorneys representing them during this trial. None of these attorneys raised any objection to the oral charge given the jury by the trial court.

Evans' indictment charged that he violated section 13-11-2(a)(2) of the Alabama Code of 1975, which provides, in pertinent part, that:

(a) If the jury finds the defendant guilty, it shall fix the punishment at death when the

> defendant is charged by indictment with any of the following offenses and with aggravation, which must also be averred in the indictment, and which offenses so charged with said aggravation shall not include any lesser offenses:
>
> * * *
>
> (2) Robbery or attempts thereof when the victim is intentionally killed by the defendant. . . .

The petitioner contends that the trial judge's failure to instruct the jury on the elements of robbery before they considered his guilt or innocence on the charges constituted a violation of his due process rights, arguing that in order to find the petitioner guilty, it was incumbent upon the jury to find beyond all reasonable doubt that a robbery and an unlawful killing had taken place.

And, of course, the due process clause protects criminal defendants from conviction in a case where there has not been "proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 1073, 25 L. Ed. 2d 368, 375 (1970).

In most cases it might be proper for an Alabama appellate court to reverse and remand a conviction under the statute for failure to give such an instruction, since there is no question but that no defendant should be convicted by a jury that has not been fully charged on all elements making up the crime charged. The instant case is rather unique, however, in that the petitioner had pled guilty, voluntarily and with full knowledge of his Boykin rights, on four separate occasions, at least once before the jury, in that counsel for the petitioner raised no

objection to the court's failure to so instruct, and in that this case is in this Court by means of collateral attack rather than direct appeal. This Court is of the opinion that the trial judge erred in failing to instruct the jury on the elements of robbery, but that such error was harmless or in any event did not result in any fundamental unfairness. See Bradley v. Wainwright, 561 F. 2d 1200 (5th Cir. 1977). It cannot be said under the evidence presently before the Court that a properly charged jury might have reached a different verdict, e.g., Henderson v. Kibbe, 431 U.S. 145, 97 S. Ct. 1730, 52 L. Ed. 2d 203 (1977), so it is quite clear that no constitutional error justifying habeas corpus relief is present.[1]

[1]Footnote 1 and all other footnotes for this opinion are reproduced seriatim at the end of this opinion. See pp. 119a - 128a, infra.

Even if the Court were persuaded that the trial court's failure to instruct the jury on the elements of robbery amounted to a violation of the petitioner's due process rights, habeas relief would be foreclosed by the petitioner's admitted failure to raise a contemporaneous objection at trial to the omitted instruction. Clearly petitioner and his admittedly competent counsel were given the opportunity to object to the purportedly erroneous omission. Under Alabama law as it stood at the time of this trial, no defect in an oral charge was to be reviewed on appeal unless a timely objection had been made. E.g., Jacobs v. State, 361 So. 2d 607 (Ala. Cr. App. 1977). While the rule has recently been relaxed by an amendment to Rule 39(k) of the Alabama Rules of Appellate Procedure that permits the Supreme Court to note any plain error in the proceedings, the prior rule is

applicable to this case. Of course, the fact that direct appeal is barred does not preclude this Court from considering the issues on a habeas corpus petition, but it is incumbent upon a party that has violated a state contemporaneous objection rule to make a showing of cause for or prejudice from the procedural default before the procedural default may be waived in federal court. See, e.g., Wainwright v. Sykes, 433 U.S. 72, 86-87, 97 S. Ct. 2497, 2506, 53 L. Ed. 2d 594, 608 (1977); Spinkellink v. Wainwright, 578 F. 2d 582, 591-92 (5th Cir. 1978). In the instant case the only cause for the procedural default is the conclusion of the petitioner's trial counsel that no instruction was necessary, and there is simply no evidence that counsel was incompetent or inadequate. In addition, there is no prejudice at all flowing from the procedural default since there is

little if any likelihood that any other verdict would have been reached by the jury. Accordingly, the Court is of the opinion that habeas relief is not available to the petitioner herein for the trial court's failure to instruct the jury on the elements of robbery.[2]

II.

The second portion of the petitioner's habeas attack challenges the propriety of the Alabama Death Penalty Statute on various constitutional grounds. The petitioner raises seven specific constitutional objections to the Alabama statute, each of which is considered separately below by the Court.

Before considering the petitioner's various challenges, it is necessary to review the Alabama statutory scheme for the imposition of the death penalty. The Court notes at the outset that the Alabama statute was enacted in 1975, after

the Supreme Court's decision in Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), but prior to the 1976 death penalty cases of Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976); Proffitt v. Florida, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976); Jurek v. Texas, 428 U.S. 262, 96 S. Ct. 2950, 49 L. Ed. 2d 929 (1976); Woodson v. North Carolina, 428 U.S. 280, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976); and Roberts v. Louisiana, 428 U.S. 325, 96 S. Ct. 3001, 49 L. Ed. 2d 974 (1976).

The Alabama statute permits jury imposition of the death penalty for seven specified cases of felony murder,[3] for murder of any peace officer while on duty or because of some official or job-related act of such a peace officer while on duty,[4] for murder committed while the defendant is under a sentence of life imprisonment,[5] for first degree murder for

remuneration or pursuant to a contract,[6] for murder resulting from the intentional killing of a person by willfully setting off or exploding dynamite dangerously near a vessel, railroad car, and inhabited or uninhabited dwelling, or certain buildings,[7] for multiple first degree murders,[8] for first degree murder of a public official stemming from or related to the official's position, acts, or capacity,[9] for any murder committed by any defendant who in the 20 years preceding the crime was convicted of murder in the first or second degree,[10] and for murder of any witness subpoenaed to testify against the defendant.[11]

In death penalty cases, if the jury finds the defendant not guilty of capital murder it must return a verdict of acquittal and the defendant is to be discharged. If the jury is unable to agree on a verdict of guilty or not guilty, or

if the jury is unable to agree on the imposition of the death penalty, then the trial court may enter a judgment of mistrial. After such a mistrial, the defendant may be once again tried for the aggravated offense or for a lesser, non-aggravated offense carrying a lighter sentence. Ala. Code, § 13-11-2(c).

In any case in which the jury finds the defendant guilty and imposes the death sentence, the trial court is required by section 13-11-3 to hold a pre-sentence hearing to determine whether to sentence the defendant to death or to life imprisonment without parole. These are the only options for the sentencing authority. At this hearing the court is to receive all evidence relevant to sentencing, particularly evidence reflecting upon the mitigating and aggravating circumstances set out in sections 13-11-6 and 13-11-7.[12] The Court is permitted to consider any

evidence that it considers to have probative value, regardless of its admissibility under exclusionary rules, with the caveat that the defendant be given a fair opportunity to rebut any hearsay statements.

Following this hearing, the trial judge must weigh the aggravating and mitigating circumstances revealed by the evidence and either accept the sentence of death imposed by the jury, or reject the jury's sentence and impose upon the defendant the sentence of life imprisonment without parole. Id., § 13-11-4. If the trial judge accepts the jury determination and imposes the death sentence, then the judge is required to set forth in writing findings of fact from the trial and the pre-sentence hearing that include, at the least, one or more of the statutory aggravating circumstances that has been found to exist and which is or

are deemed sufficient to support a sentence of death, and any of the statutory mitigating circumstances found to be present which the trial judge determines to be insufficient to outweigh the death sentence. Id., § 13-11-4(1) & (2).

Any capital murder conviction that results in imposition by the trial judge of the death penalty is automatically reviewed by the Alabama Court of Criminal Appeals and the Alabama Supreme Court. Id., §§ 12-22-150, 12-22-240, 12-22-243, 13-11-5, and A.R.A.P. Rule 39(c).

A. Preclusion of jury consideration of lesser included offenses

Under the Alabama statute, the trial jury in a capital case is specifically precluded from considering any lesser offenses that might be revealed by the evidence. Ala. Code, § 13-11-2(a), and the petitioner contends that such a

preclusion is violative of both the Eighth and Fourteenth Amendments to the United States Constitution in that persons accused of capital crimes are denied due process of law, equal protection under the law, and are subjected to cruel and unusual punishment. As the petitioner notes at page 8 of his brief in support of the petition, Alabama is the only state that has adopted a post-Furman statute precluding consideration of lesser offenses in capital cases.[13]

On the due process contention, the petitioner argues that a jury that is precluded from considering lesser offenses is likely to resolve its doubts in favor of conviction where one or more of the elements of the offense charged is in doubt but the evidence clearly reveals that the defendant is guilty of some crime. In Keeble v. United States, 412 U.S. 205, 93 S. Ct. 1993, 36 L. Ed. 2d 844

(1973), the United States Supreme Court was confronted with the issue of whether an Indian prosecuted under the Major Crimes Act, Title 18 U.S.C.A., §§ 1153 & 3242, was entitled to jury consideration of a lesser included offense when such lesser offense was not one of the crimes enumerated in the Act. A 6-3 majority of the court concluded that the defendant was entitled to such a lesser offense instruction, ruling that "it is now beyond dispute that the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater." 412 U.S. at 208, 93 S. Ct. at 1995, 36 L. Ed. 2d at 847, citing Fed. R. Crim. Proc. 31(c). This Court notes, however, that Keeble was a federal criminal prosecution, as were each of the earlier cases cited in the majority opinion as

of the petitioner on the lesser offense issue.

Nor does the Court find it persuasive that capital juries might, as suggested in Keeble, find a defendant guilty and impose the death penalty on an improper predicate because they are convinced that the defendant is guilty of some lesser offense, although they have reasonable doubt as to the evidence on the capital offense. The argument assumes that jurors will abdicate their responsibility and violate their oaths in the interest of punishing criminal conduct, without consideration of any disparity between the perceived crime and the punishment to be imposed, and that trial judges will fail to properly weigh the sufficiency of the evidence submitted to the jury. The record in capital cases does not support such a conclusion of abdication of responsibility, for there have been two

supporting the rule set out above. See Sansone v. United States, 380 U.S. 343, 85 S. Ct. 1004, 13 L. Ed. 2d 882 (1965); Berra v. United States, 351 U.S. 131, 76 S. Ct. 685, 100 L. Ed. 1013 (1956); Stevenson v. United States, 162 U.S. 313, 16 S. Ct. 839, 40 L. Ed. 980 (1895). The Keeble Court's opinion is therefore limited to instructions in federal criminal cases, for there is no language in the opinion that would, as the petitioner herein seeks to do, require states to follow the Federal Rules of Criminal Procedure. Nor can it be argued that the failure to instruct on lesser offenses violates the due process clause, for the Keeble Court acknowledges that such a failure has never been construed to violate the due process clause. 412 U.S. at 213, 93 S. Ct. 1993, 36 L. Ed. 2d at 850. On this basis, this Court is of the opinion that Keeble does not stand as valid authority for the due process claims

acquittals and three mistrials in cases arising under the Alabama statute. First Stipulation between the Parties, no. 7. Indeed, there is a forceful argument favoring capital defendants in that the preclusion of lesser offenses makes it incumbent upon the state prosecutor to establish that the defendant is guilty as charged and that the defendant should receive the death penalty for the crime. If one juror is convinced that the death penalty is not proper under the circumstances, then no conviction can be obtained under the Alabama statute, although the defendant may be subject to retrial if a mistrial is declared. This Court would rather presume that jurors, especially in a capital case, will be true to their oaths and return verdicts in accordance with the facts and the law, rather than adopting petitioner's view that the jury can be expected to abdicate

its responsibility.[14] Indeed, to follow the petitioner's reasoning the Seventh Amendment would become a mockery in any criminal case, since no juror could be presumed to abide by his or her oath in considering issues presented.

A different due process contention set forth by the petitioner respecting the lesser offense issue argues the instruction entitlement has been specifically required in capital cases by the Supreme Court in Gregg. This position evidently results from a misreading of Gregg, for no such requirement is present. The Gregg Court merely held that the jury discretion inherent in an instruction permitting conviction on a lesser offense was not unconstitutional as permitting arbitrariness and capriciousness in the jury deliberations, and in no way held that such lesser offense instructions were required. 428 U.S.at 199, 96 S. Ct.

2909, 49 L. Ed. 2d at 889. This Court is convinced that the fact that each of the state schemes that have received Supreme Court approval (Georgia, Florida, and Texas) permit lesser offense instructions does not invalidate the Alabama statute in this respect as an attempted response to the Furman concerns of arbitrary, capricious, or standardless jury decisions in capital cases that resulted in the death sentence being imposed freakishly and/or wantonly. And, of course, it is clear that a jury-only sentencing scheme that permits consideration of lesser included offenses is indicative of the concerns voiced in Furman. See Roberts v. Louisiana, 428 U.S. 325, 334-35, 96 S. Ct. 3001, 49 L. Ed. 2d 974, 982 (1976) (plurality opinion).

A final point militating against the due process arguments advanced by the petitioner on the lesser offense issue is the

fact that adequate safeguards exist within the statutory framework to ensure that no defendant who properly should be convicted of a lesser offense will be executed after imposition of the death penalty. First, assuming arguendo juror misconduct as alleged by the petitioner, it would still be necessary for the trial judge to weigh the aggravating and mitigating circumstances before determining whether or not to accept the sentence imposed by the jury. If the evidence does not support a conviction under the capital statute, then the trial judge should be able to ascertain this in the pre-sentence hearing and sentence the defendant to life imprisonment without parole. But perhaps the trial judge is assumed to violate his oath also. If so, then the sufficiency of the evidence must still be considered by appellate courts. In the Court's view, the only way that an Alabama defendant

could possibly be executed improperly as a result of the failure to charge on lesser included offenses would be for twelve citizens to violate their oaths as jurors and for no less than eight judges to violate their oaths as jurists.

The petitioner further alleges that the preclusion of lesser included offenses violates the equal protection rights of capital defendants, since all defendants in non-capital cases have the privilege of receiving lesser included offense instructions. This contention is piggy-backed on the due process contention that the failure to so instruct permits juries to convict in capital cases on less than guilt proven beyond a reasonable doubt. If, of course, the evidence was that the statute had permitted juries to convict on less than proof beyond a reasonable doubt, then the statute would unquestionably be unconstitutional. See Addington v.

Texas, ___ U.S. ___, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979); In re Winship, 397 U.S. 358, 370, 90 S. Ct. 1068, 25 L. Ed. 2d 368, 378 (1970) (Harlan, J., concurring). But here the Court has concluded that while abdication of juror responsibility is possible in any case, there is nothing in the Alabama statute that makes it more likely to occur in cases under the statute, nor does this Court assume that "juries will disobey or nullify their instructions." Jurek v. Texas, 428 U.S. 262, 279, 96 S. Ct. 2950, 2959, 49 L. Ed. 2d 929, 942 (1976) (White, J., concurring). Thus, without piling speculation upon assumptions, it cannot be said that the Alabama statutes impose a different standard of proof in capital cases than is present in non-capital cases.

A second equal protection contention is that capital defendants are not accorded treatment equal to that of

non-capital defendants, since non-capital defendants are afforded the opportunity to have juries instructed on lesser included offenses. This argument is also without merit, for the state clearly has a compelling interest in prescribing the process by which those upon whom it seeks to impose the ultimate penalty of death are to be tried. The Court has noted supra in connection with review of the Keeble decision that there is no fundamental right to a lesser offense instruction. Since this Court finds a rational basis for the state's distinction between capital and non-capital defendants, the allegations of equal protection violations are without merit.

The final argument advanced by the petitioner attacking the preclusion of lesser included offenses alleges violations of the Eighth Amendment's proscription of cruel and unusual punishment.

The petitioner alleges that this portion of the statute fails to reflect "contemporary community values" and "contemporary standards of decency," an Eighth Amendment requirement. See, e.g., Woodson v. North Carolina, 428 U.S. 280, 294-97, 96 S. Ct. 2978, 49 L. Ed. 2d 944, 955-57 (1976). Again, the petitioner piggy-backs his contention on the assumption that the Alabama system permits a conviction in capital cases on less than proof beyond a reasonable doubt. Such a system, this Court agrees, would be abhorrent to modern community values and contemporary standards of deceny, but here, as noted earlier, the petitioner piles a supposition on top of an assumption to achieve the position that the burden of proof is lessened. This is simply too conjectural to bear consideration by the Court.

A second argument advanced by the petitioner on Eighth Amendment grounds contends that since Alabama is the only state that precludes lesser included offenses, it amounts to cruel and unusual punishment. This Court acknowledges that Coker v. Georgia, 433 U.S. 584, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1977), indicates that legislative attitudes in other areas have some relevance to determining whether or not a certain penalty is excessive or unreasonable. The Georgia rape statute was struck down in that case as being excessive in part because Georgia was the only state that permitted the death sentence for rape. In the instant case, however, the Court is not concerned with any penal distinction between the schemes in the various states, but rather with a procedural distinction. Coker is in no way directed toward procedural distinctions under various death

penalty statutes, and the Court is not persuaded that it has any relevance to the Eighth Amendment question in this case. The Court is convinced that the fact that Alabama is the only state that employs the procedural preclusion of lesser included offenses has no Eighth Amendment implications, and that the petitioner is entitled to no habeas corpus relief on this point.

In conclusion with respect to the preclusion of lesser included offenses, the Court is content that such offenses are not constitutionally required to be submitted to the jury, that such a system does not lessen the burden of proof borne by the prosecution, that the rights of capital defendants are adequately protected by the statutory scheme, even assuming abdication of responsibility by jurors, and that the preclusion is not on its face abhorrent to either the Eighth or Fourteenth

Amendments to the United States Constitution.

B. The Sentencing Authority Under the Alabama Statute

The petitioner's second area of challenge to the constitutionality of the Alabama death penalty statute is concerned with the requirement that a capital jury that finds a defendant guilty must impose the death sentence or impose no penalty at all. The petitioner contends that this provision is conducive to arbitrary or capricious jury decisions in death penalty cases, since it permits juries to refuse to impose the death sentence in those cases in which they do not feel that the defendant deserves to die. This concern led to the rejection of mandatory death penalty statutes in North Carolina and Louisiana by the United States Supreme Court, since it was felt by the plurality of the Court

that the unbridled jury discretion condemned by Furman could not be remedied by a mandatory statute removing all sentencing discretion from the jury, because such a statute encourages jurors to consider the harshness of the penalty while deliberating on the guilt or innocence of the capital defendant. Woodson, 428 U.S. at 303, 96 S. Ct. 2978, 49 L. Ed. 2d at 960; Roberts, 428 U.S. at 335, 96 S. Ct. 3001, 49 L. Ed. 2d at 982. The question for this Court is whether the Alabama statutory scheme permits such unchanneled jury discretion in capital cases as to merit the death penalty to be imposed "freakishly or wantonly." See Furman v. Georgia, 408 U.S. 238, 309-10, 92 S. Ct. 2726, 33 L. Ed. 2d 346, 390 (1976) (Stewart, J., concurring).

At the outset, the distinctions between the Alabama statute and those struck down in Woodson and Roberts should be noted. The North Carolina statute struck

down in Woodson made the death penalty mandatory for all first degree murders.[15] Thus the only discretion allowed the jury was the decision whether the defendant was guilty of first degree murder or some other homicide offense. The Louisiana statute struck down in Roberts required jury imposition of the death penalty in all cases of conviction for first degree murder, aggravated rape, aggravated kidnapping, or treason.[16]

In Woodson, the Supreme Court struck down the statute for three, distinct reasons. First was the concern that the mandatory nature of the statute was abhorrent to contemporary standards requiring rejection of the mandatory imposition of the death penalty for every person convicted of a specified offense. 428 U.S. at 288-301, 96 S. Ct. 2978, 49 L. Ed. 2d at 951-59. The Court's second concern was that the mandatory nature of the

statute was conducive to unchanneled jury discretion since it permitted jurors to weigh the harshness of the penalty and thus determine, without standards, which first degree murderers should live and which should die. Id. at 302-03, 96 S. Ct. 2978, 49 L. Ed. 2d at 959-60. Finally, the Court rejected the statute for its failure to permit consideration by the sentencing authority of the particularized aspects of the character and record of defendants upon whom the death penalty was sought to be imposed. Id. at 303-05, 96 S. Ct. 2978, 49 L. Ed. 2d at 960-62.

While the Louisiana statute narrowed the scope of the offenses for which death could be imposed, the Roberts decision found the same problems that had inflicted the North Carolina statute especially "lack of focus on the circumstances of the particular offense and the character and propensities of the offender," 428

U.S. at 333, 96 S. Ct. at 3006, 49 L. Ed. 2d at 981, and the failure to provide "standards to channel jury judgments [or permit] review to check the arbitrary exercise of the capital jury's de facto sentencing discretion." Id. at 335, 96 S. Ct. at 3007, 49 L. Ed. 2d at 982.

Review of the Alabama statute reveals that none of the concerns leading to the reversals in Woodson and Roberts are present. At the outset, the Alabama statute is not mandatory, although the petitioner hotly contests this fact. The sentencing authority is the trial judge, not the jury, and the judge is empowered to sentence a convicted capital defendant to the death penalty or life imprisonment without parole. Ala. Code, § 13-11-4. The Court, accordingly, does not perceive there to be any mandatory death penalties under the Alabama statute. The fact that death is the only punishment that the jury

can prescribe does not put the Alabama statute on a par with North Carolina's and Louisiana's invalid statutes, since the jury is not the ultimate sentencing authority, as it was in both North Carolina and Louisiana. Nor does the Alabama scheme induce the type of unchanneled jury discretion described in Woodson and Roberts, since the Alabama juries are given the option of convicting the defendant and imposing the death penalty, mistrying the case, or returning a verdict of acquittal. The Alabama jury has no option, as did those in North Carolina and Louisiana, of deciding that the death penalty is too harsh and thus convicting the defendant of a lesser offense to avoid the imposition of such a harsh punishment. Nor is it likely that the statutory scheme will lead to capital punishment being freakishly or wantonly imposed, since it is to be imposed by the

jury in every capital case in which all twelve jurors agree on that punishment, and in none other. Finally, the facet of the Alabama process permitting imposition of sentence by the trial judge is a factor present in neither Woodson nor Roberts, and is, in the opinion of this Court, a valuable aid in the sentencing process. See Proffitt v. Florida, 428 U.S. 242, 252, 96 S. Ct. 2960, 49 L. Ed. 2d 913, 923 (1976). The final factor leading to reversal in Woodson and Roberts—the lack of individualized consideration by the sentencing authority of the character and record of the defendant in each case—is not present under the Alabama statute, since Alabama requires the trial judge to consider eight aggravating and seven mitigating factors in every case before the death penalty is imposed, and the trial judge is required to enter on the record specific findings of fact with respect to these factors.

Ala. Code, §§ 13-11-3, 4, 6, & 7. Accordingly, this Court finds nothing in the sentencing authority provided under the Alabama statute that has been condemned in either Woodson or Roberts.[17]

In summary, the Court is not persuaded that the Alabama statute runs afoul of constitutional punishment by requiring capital juries to fix the punishment at death on a vote of conviction. The petitioner goes astray by assuming that the jury is the sentencing authority; it is not. "The jury, when deliberating on a verdict, is only concerned with the issue of the defendant's guilt or innocence." Jacobs v. State, 361 So. 2d 640, 646 (Ala. 1978) (Torbert, C. J., concurring in part and dissenting in part). The jury, having reached a verdict, has absolutely no input into the sentencing process. This approach, adopted in response to the Furman concern of unchanneled jury discretion, was approved

under similar circumstances in Proffitt, where the Florida statute was upheld. The only distinction between the Florida statute and the Alabama statute is that Florida juries are permitted to consider lesser included offenses. If a Florida defendant is convicted of a statutorily defined capital offense, the pre-sentence hearing is conducted before judge and jury and the jury's sentence, which is determined by a majority vote, is merely advisory to the trial judge, who stands as the sentencing authority. Proffitt, 428 U.S. at 248-49, 96 S. Ct. 2960, 49 L. Ed. 2d at 920-21. The Florida statute has been upheld on constitutional grounds and this Court is content that the protections afforded by Florida are adequately and similarly afforded under the Alabama statute.

C. The Prosecutorial Burden of Proof With Respect to Aggravating Circumstances

The petitioner next attacks the constitutionality of the Alabama statute on the basis that the statutory sentencing scheme does not require the state to prove the existence of aggravating circumstances beyond a reasonable doubt, since a trial judge who fixes the punishment at death is required only to set out "one or more of the aggravating circumstances . . . which it finds exists" and "any of the mitigating circumstances . . . which it finds insufficient to outweigh the aggravating circumstances." Ala. Code, § 13-11-4(1) & (2). The petition contends that such a process is violative of the due process clause of the Fourteenth Amendment.

The petitioner correctly notes that Gardner v. Florida, 430 U.S. 349, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977), has established the rule that the sentencing

process, just like the trial itself, must comport with the fundamental principles of due process:

> [I]t is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause. Even though the defendant has no substantive right to a particular sentence within the range authorized by statute, the sentencing is a critical stage of the criminal proceeding at which he is entitled to the effective assistance of counsel. . . . The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process.

430 U.S. at 358, 97 S. Ct. at 1205, 51 L. Ed. 2d at 402 (citations omitted). The

petitioner's position is that since the aggravating circumstances are elements of the punishment, proof of these elements ought to be required beyond a reasonable doubt as a fundamental due process protection.

The petitioner's position is untenable, in this Court's view, for he confuses the procedural with the substantive. Substantively, no defendant may be convicted under the Alabama death penalty statute without proof beyond a reasonable doubt of a violation of some provision of section 13-11-2(a) of the Alabama Code. Due process entitles defendants to nothing more. Procedurally, a defendant who has been convicted of a capital crime is entitled to have the trial judge consider the statutorily prescribed aggravating and mitigating circumstances, and a trial judge imposing a death sentence is required to enter specific findings respecting such

circumstances. During this process the defendant is entitled to put on evidence in favor of mitigation or in opposition to aggravation, but the petitioner here contends that the capital defendant has a fundamental right to have any aggravation present in his case to be proved beyond a reasonable doubt. If the question of aggravation in capital cases under the Alabama statute were submitted to the jury, then this Court would be inclined to follow the lead in Spinkellink v. Wainwright, 578 F. 2d 582, 610 (5th Cir. 1978), and State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973), and rule that the jury must be instructed that aggravating circumstances must be established by proof beyond a reasonable doubt before the jury could consider such circumstances in deliberating a death sentence case. Under Alabama law, however, the trial judge is the sentencing authority upon whom rests the burden of

weighing the aggravating and/or mitigating circumstances. The defendant cannot, as far as the Court can ascertain, be convicted of a capital crime under Alabama statute without proof beyond a reasonable doubt of at least one of the statutorily prescribed aggravating circumstances, since a reading of the statute reveals that the aggravating circumstances set out in section 13-11-6 actually define the capital crimes set out in sections 13-11-2(a)(1)-(14).[18]

The only problem that could result would be in an instance in which a sentencing judge considers an aggravating circumstance that is not definitional of the crime for which the defendant has been convicted, such as, for example, a judge in a robbery-murder case [§ 13-11-2(a)(2)] finding that the capital felony was committed to disrupt or hinder the lawful exercise of any governmental function

[§ 13-11-6(7)]. In this instance there would be a serious due process issue, for the proof supporting the conviction would not necessarily support the finding of the aggravating circumstance. There is no evidence before the Court that this has happened in any of the 50 or so cases that have been tried under the statute, and is not a matter for concern in this case. The Court cites the example only to acknowledge that the petitioner's concern has a conceivable basis, but not such as would require the invalidation of the entire statutory scheme.

In conclusion, this Court is of the opinion that the fact that the Alabama statute does not specifically require proof beyond a reasonable doubt of aggravating circumstances does not require invalidation of the statute. The aggravating circumstances are relevant only as guidance to the sentencing

authority, they do not come into play until after the capital defendant has been convicted, and such conviction cannot be obtained without proof beyond a reasonable doubt of the capital crime, which necessarily amounts to proof beyond a reasonable doubt of the underlying aggravating circumstances. The Court does not subscribe to the petitioner's contention that this finding is sufficient to require remand of the forty-three death sentences presently being served in Alabama for consideration by the various trial courts of whether any of the statutory circumstances were established beyond a reasonable doubt. As the Fifth Circuit noted in Spinkellink, supra at 610, this position is without merit for the jury verdict indicates that the aggravating circumstance underlying the capital crime was proved beyond a reasonable doubt.

D. The Delayed Sentencing Procedure

The petitioner contends that the Alabama process of vesting sentencing discretion in the trial judge following a jury verdict of guilty and jury imposition of the death penalty is constitutionally impermissible because it places upon the judge the intolerable burden of opting between a mere acquiescence in the jury's verdict or a refusal to accept a publicly pronounced unanimous verdict rendered by twelve members of the citizenry from which he is elected.

At the outset, the petitioner mischaracterizes the issue when he asserts that "the judge is thus placed in the exposed position of having to override the jury's death sentence, and to take the public heat of 'refusing to accept' a death sentence, in order to give the defendant the benefit of the sentencing hearing which is his constitutional due."

Such reasoning assumes that the jury reached the decision to impose the death sentence after deliberations that included consideration of various other sentences. That is not the case in Alabama, where the jury's only duty is to determine the guilt or innocence of the capital defendant; a finding of guilt requires the jury to impose the death penalty to the exclusion of any other punishment. The Alabama sentencing authority is the trial judge and, accordingly, the jury verdict as to punishment must be characterized as advisory. This is similar to the Florida capital punishment scheme, except that in Florida the jury has the benefit of the pre-sentence hearing before they reach a verdict, they are not compelled to return a sentence of death, and the sentence is decided by a majority of the panel. Proffitt, 428 U.S. at 248-49, 96 S. Ct. 2960, 49 L. Ed. 2d at

920-21. The Florida framework was upheld in Proffitt, and this Court is not persuaded that the burden on an Alabama sentencing judge is any different from that on a Florida sentencing judge. Nor is the Court persuaded that a sentencing judge would abdicate his responsibility for political expediency as the petitioner suggests, since the record indicates that trial judges have on various occasions reduced jury imposed death sentences to life imprisonments without parole.[19] Accordingly, the Court is content that the petitioner's contentions on this point are without merit.

E. The Statutory Limitations on Mitigating Circumstances

The petitioner next contends that the Alabama statute is unconstitutional to the extent that it delimits the mitigating circumstances that the sentencing authority

may consider and weigh against the aggravating circumstances in making a sentence determination in a capital case. There is no question but that a statute that precludes consideration of relevant mitigating circumstances is unconstitutional.

> [W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any aspect of the defendant's character or record and any of the circumstances of the offense that the defense proffers as a basis for a sentence less than death. . . . [W]e cannot avoid the conclusion that an individualized decision is essential in capital cases. . . . [A] statute that prevents the sentencer in all capital cases from giving independent

> mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.

Lockett v. Ohio, 438 U.S. 586, 604, 98 S. Ct. 2954, 2965, 57 L. Ed. 2d 973, 990 (1978) (Emphasis in original) (Footnote omitted). Thus, it is clear that a statute which unduly limits the sentencer's authority in inquiring into mitigating factors cannot pass constitutional muster.

The petitioner contends that the seven mitigating factors set out in the Alabama statute, Ala. Code, § 13-11-7, are exclusive, relying upon the opinion of one member of the Supreme Court of Alabama. In Jacobs v. State, 361 So. 2d 640 (Ala. 1978), Chief Justice Torbert stated in a separate opinion that:

> The list of mitigating circumstances in section 13-11-7, Code of Alabama 1975, is exclusive, and the grounds argued by the petitioner do not fit within any of the seven enumerated factors in that section.

Id. at 648 (Torbert, C.J., concurring in part and dissenting in part). This Court, however, cannot be guided by one justice's opinion that forms no part of the opinion of the Court, especially when that opinion is directly contrary to the language of the statute. Section 13-11-3 provides, with respect to the pre-sentence hearing, that:

> In the hearing, evidence may be presented as to any matter that the court deems relevant to sentence and shall include any matters relating to any of the aggravating or mitigating circumstances enumerated in sections 13-11-6 and 13-11-7. Any

such evidence which the court deems to have probative value may be received. . ..

The legislature clearly intended that the sentencer be permitted to consider any mitigating factor, not just those set out in the statute. Indeed, on rehearing in the Jacobs case, supra, six justices of the Alabama Supreme Court clarified the issue by quoting section 13-11-3 and emphasizing the portion respecting the introduction of any evidence and not just that reflecting upon the mitigating factors. Jacobs v. State, 361 So. 2d 640, 652 (Ala. 1978). The Supreme Court reaffirmed this position in Ex parte Cook, 369 So. 2d 1251 (Ala. 1978), where a death sentence was reversed and remanded to the trial court for a new sentence hearing in which the trial court was to consider any mitigating factor, not just the statutory factors. Since the case law reveals that the Supreme

Court of Alabama has read the statute as permitting consideration of any relevant mitigating factor, this Court is of the opinion that the petitioner's contentions on this point are without merit.[20]

F. Appellate Review Under the Alabama Statute

The petitioner next challenges the statutorily prescribed appellate review in death penalty cases, arguing that the Alabama scheme is not compatible with the level of review determined to be necessary in such cases by Gregg, Proffitt, and Jurek. The petitioner apparently takes the position that the statute is fatally defective for failing to require Alabama appellate courts to engage in the form of comparative review required of the Georgia Supreme Court in death penalty cases.

Under the Georgia statute, the Georgia Supreme Court automatically reviews

every case in which the death penalty is imposed and is directed by statute to consider the punishment and any errors enumerated in the appeal, and the Court is further directed to ascertain whether the jury verdict was imposed under the influence of passion, prejudice, or any other arbitrary factor, whether the evidence supports the jury's or the judge's findings of statutory aggravating circumstances, and whether the sentence is excessive or disproportionate to the penalty imposed in similar cases. Ga. Code Ann. § 27-2537 (Supp. 1975), cited in Gregg v. Georgia, 428 U.S. 153, 166-67, 96 S. Ct. 2909, 49 L. Ed. 2d 859, 871 (1976). Additionally, when the death sentence is affirmed, the Georgia Supreme Court is required to include in its decision reference to similar cases that it has taken into consideration. Ga. Code Ann. § 27-2537(e) (Supp. 1975). In considering the statutory review

procedure in Gregg, the Supreme Court of the United States reasoned that:

> The provision for appellate review in the Georgia capital-sentencing system serves as a check against the random or arbitrary imposition of the death penalty. In particular, the proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury. If a time comes when juries generally do not impose the death sentence in a certain kind of murder case, the appellate procedures assure that no defendant convicted under such circumstances will suffer a sentence of death.

Gregg, 428 U.S. at 206, 96 S. Ct. at 2940, 49 L. Ed. 2d at 893.

While the Georgia process is laudable in establishing objective sentencing

standards, the process was by no means required as a constitutional matter by the Gregg decision. The Florida appellate process upheld in Proffitt, for instance, provides for automatic review of death sentence cases by the Florida Supreme Court, but does not require that court to conduct any specific form of review. Fla. Stat. § 921.141(4) (Supp. 1976-77), cited in Proffitt v. Florida, 428 U.S. 242, 250, 96 S. Ct. 2960, 49 L. Ed. 2d 913, 922 (1976). The Supreme Court noted in Proffitt, however, that by judicial construction the review function of the Florida Supreme Court is similar to that of the Georgia Supreme Court. 428 U.S. at 251, 96 S. Ct. 2960, 49 L. Ed. 2d at 922, citing State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973).[21]

Conspicuously absent from the petitioner's brief on the review issue is any mention of the review procedures under

the Texas statute upheld in Jurek. The statute provides only for expedited review of death penalty decisions by the Texas Court of Criminal Appeals, without defining the review function of that Court. Tex. Code Crim. Proc., Art. 37.071(f) (Supp. 1975-76), cited in Jurek v. Texas, 428 U.S. 262, 269, 96 S. Ct. 2950, 49 L. Ed. 2d 929, 937 (1976). The Supreme Court was apparently satisfied that the limited circumstances under which the death penalty might be sought would serve to insure that the death penalty would be "imposed for the most serious crimes [and] . . . that [it] will only be imposed for the same type of offenses which occur under the same types of circumstances." 428 U.S. at 270, 96 S. Ct. at 2955, 49 L. Ed. 2d at 937, quoting State v. Jurek, 522 S.W. 2d 934, 939 (Tex. Cr. App. 1975).

It is apparent that the question for this Court is whether the review procedure

adopted by the Alabama statute properly requires appellate courts in capital cases to conduct their review in such a manner as will ensure that the death penalty is imposed only for the most serious crimes and only in circumstantially similar cases. This Court is of the opinion that the Alabama procedure does permit such comparative review and accordingly does not run afoul of Gregg, Proffitt, or Jurek.

As noted above, any death penalty is automatically reviewed by the Alabama Court of Criminal Appeals, even where, as with the petitioner here, the defendant does not desire such review.[22] Ala. Code § 13-11-5; see also §§ 12-22-150 & 12-22-243. Additionally, by judicial rule-making power, the Alabama Supreme Court is required to review any death penalty decision for which a writ of certiorari is sought. Ala. R. App. Proc. 39(c). The case law

under the Alabama statute makes it clear that the petitioner's contention that Alabama appellate courts do not engage in comparative review is without merit. In the very first case to interpret the statute, Jacobs v. State, 361 So. 2d.640 (Ala. 1978), the Alabama Supreme Court acknowledged its responsibility to consider the circumstances of other death penalty cases in reaching its decision:

> The Court of Criminal Appeals has spelled out specifically how death sentences, reviewed under Alabama's automatic appeal statute, have been reversed and remanded for new trials. This Court has carefully reviewed each point raised by the accused in his petition, which was granted as a matter of right because of the sentence of death. We are familiar with other cases reviewed by this Court in the last

> decade involving death sentences and we are convinced that the sentence here was not arbitrary or capriciously entered.

Id. at 644-45. In Clements v. State, 370 So. 2d 708 (Ala. Cr. App. 1978), the Alabama Court of Criminal Appeals specifically rejected the contention advanced by the petitioner here. Further, Beck v. State, 365 So. 2d 985 (Ala. Cr. App. 1978), stands as a specific example of comparative review by the Alabama Court of Criminal Appeals, which, after reviewing the facts, noted that "[t]he facts in this case, after a careful evaluation, show a marked similarity with those in Jacobs v. State, supra. . . . It seems to us that the result is inescapable that the punishment, too, should be the same." Id. at 1005.

Besides comparative review, it is clear that the Alabama appellate courts

have devised another safeguard for capital defendants—independent appellate weighing of the aggravating and mitigating circumstances in each case. Evans v. State, 361 So. 2d 654, 662 (Ala. Cr. App. 1977). The Alabama Court of Criminal Appeals has specifically recognized its responsibility to do this on at least three occasions, see Neal v. State, 372 So. 2d 1331 (Ala. Cr. App. 1979); Thomas v. State, 369 So. 2d 71, 72 (Ala. Cr. App. 1979); Beck v. State, 365 So. 2d 985, 1005 (Ala. Cr. App. 1978), and various convictions have been reversed and remanded for trial court improprieties in conducting the sentencing hearing. E.g., Keller v. State (Ala. Cr. App. 1979); Ex Parte Cook, 369 So. 2d 1251 (Ala. 1978).

The record is clear that the review scheme permitted by the Alabama death penalty is compatible with the teachings of Gregg, Proffitt, and Jurek, since the

process ensures the adequacy of the trial and sentencing process and that the death sentence will be imposed uniformly for similar serious offenses, rather than freakishly or wantonly, as condemned by Furman.

G. Mandatory Nature of the Alabama Statute

The petitioner's final argument contends that, in spite of the fact that the Alabama statute is not on its face a mandatory death penalty statute, it has become by application an invalid mandatory statute of a nature condemned by Woodson and Roberts.

The petitioner predicates his argument upon a statistical analysis of the 65 cases tried under the present death penalty law in which sentence hearings have been held. In fifteen of the cases the prosecutor did not seek the death penalty at the sentence hearing, but such

punishment was actively sought in the other 50 cases. In 43 of these 50 cases the jury verdict of death was allowed to stand, while the other seven defendants received life imprisonment without parole. The petitioner argues that this 86% death penalty rate upon conviction stands as evidence that Alabama possesses a mandatory death penalty statute, contending that the figure indicates that trial judges are merely satisfying the unguided mandatory sentences returned by juries.

This argument is similar to that advanced in Spinkellink v. Wainwright, 578 F. 2d 582, 604-605 (5th Cir. 1978), where the petitioner contended that the admittedly constitutional statute[23] was being applied in an arbitrary and capricious manner. After considering the possibility that permitting collateral attacks in death penalty cases that seek to go behind a facially valid statute

would result in every substantive decision of a state court in a capital case being tried de novo in other courts, the Fifth Circuit concluded that:

> The Supreme Court in Proffitt, or in Furman, Gregg, Jurek, Woodson or Roberts, could not have intended these results. We understand these decisions to hold that capital punishment is not unconstitutional per se, and that a state, if it chooses, can punish murderers and seek to protect its citizenry by imposing the death penalty—so long as it does so through a statute with appropriate standards to guide discretion. If a state has such a properly drawn statute—and there can be no doubt that Florida has—which the state follows in determining which convicted defendants receive the death penalty and which

> recieve life imprisonment, then the arbitrariness and capriciousness condemned in Furman have been conclusively removed.

Id. at 605 (footnote omitted). Admittedly, the petitioner here does not allege that application of the Alabama statute has been arbitrary or capricious in violation of Furman, but rather that it has been mandatory in violation of Woodson, Roberts, and Lockett. The Court, however, is not persuaded that any distinction exists. This Court is content that the Alabama death penalty process is constitutional under the decided cases and the fact that application of the constitutional process has resulted in a high rate of death penalty imposition does not serve to invalidate the constitutional process. Accordingly, the Court is of the opinion that the petitioner's contentions on this point are without merit.

The petitioner has introduced other statistics indicating that while the death sentence is imposed in only 18.6% and 14.7% of the felony murder cases brought under the constitutional statutes in Florida and Georgia, respectively, it has been imposed in 38.5% of the cases brought under the Alabama statute. Further, the death sentence has been imposed in only 43.3% of such cases in Florida and 27.2% of such cases in Georgia. While such figures do indicate a greater likelihood of execution for capital defendants in Alabama, they do not, in this Court's perception, reveal any constitutional infirmity in the Alabama system. There is no constitutional requirement of numerical or percentile equality in the sentencing procedures in various states; indeed, were the Alabama figure 100% this Court would not be constrained to find the system unconstitutional

in the absence of specific evidence of impermissible procedures. The Court is convinced that the fact that the Alabama statute carries a greater likelihood of imposition of the death penalty simply has no relevance to the constitutionality of the statute—it could well be that Florida and Georgia are improperly applying their constitutional statutes, or the reason for the large disparity could be any of a large number of other reasons. This Court is simply unwilling to accept an impact test in passing upon the constitutionality of a state statute, where the text reveals only differing results from those cases in other jurisdictions.

III.

Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), determined, for various reasons, that the imposition of the death penalty in many cases constitutes cruel and unusual

punishment in violation of the Eighth Amendment to the United States Constitution. Two justices considered the punishment cruel and unusual per se, 408 U.S. at 257, 314, 92 S. Ct. 2726, 33 L. Ed. 2d at 360, 393 (Brennan & Marshall, JJ., concurring), one concluded that the punishment was being applied in a discriminatory manner, 408 U.S. at 240, 92 S. Ct. 2726, 33 L. Ed. 2d at 350 (Douglas, J., concurring), while two others were troubled by the apparent arbitrariness and capriciousness with which the punishment was imposed. 408 U.S. at 306, 310, 92 S. Ct. 2726, 33 L. Ed. 2d at 388, 390 (Stewart & White, JJ., concurring).

The Alabama statute was adopted in the hope of eliminating the arbitrariness and capriciousness spoken of in Furman, and this Court is of the view that such purposes have been achieved. Since Furman, the Supreme Court has expressed in Gregg

and its companion cases the requisites of a constitutional death penalty system. First, the irretrievable nature of the death penalty requires special precautions in the process. Gregg, 428 U.S. at 188, 96 S. Ct. 2909, 49 L. Ed. 2d at 883. The Alabama framework certainly provides such special precautions, by limiting the types of felonies for which the punishment is authorized, by requiring unanimous jury agreement on the penalty to be imposed, by providing guidelines for the sentencing authority, and by providing various safeguards in the appellate review system. The "untrammeled jury discretion" which concerned Justice Douglas in Furman has been eliminated by placing sentencing authority with the trial judge, leaving the jury only to decide guilt or innocence. The bifurcated procedure "is more likely to ensure elimination of the constitutional deficiencies

identified in Furman." Gregg, 428 U.S. at 192, 96 S. Ct. at 2926, 49 L. Ed. 2d at 885. This Court is content that the leading distinction between Furman and Gregg is that in Gregg, the Georgia legislature had provided "an adequate means of controlling the necessary exercise of jury discretion." England, Capital Punishment in the Light of Constitutional Evolution: An Analysis Between Furman and Gregg, 52 Notre Dame Law, 596, 604-05 & n. 59 (1977). The Court here perceives no problem with jury discretion under the Alabama statute. The Gregg decision also favorably noted the Georgia appellate scheme as being a safeguard against many of the Furman problems, 428 U.S. at 198, 96 S. Ct. 2909, 49 L. Ed. 2d at 888, and the Alabama statute, though admittedly different in some respects, effectively provides the same safeguards.

In conclusion, the Alabama scheme requires as a prerequisite to imposition of the death penalty that a defendant be convicted by a jury of a specified homicide offense of an aggravated nature and that the trial judge enter specific findings as to the particularized aspects of the case, with adequate appellate procedures to safeguard the process. The Court is content that there is no longer "no meaningful basis for distinguishing the few cases in which [capital punishment] is imposed from the many cases in which it is not." Furman, 408 U.S. at 313, 92 S. Ct. at 2764, 33 L. Ed. 2d at 392 (White, J., concurring). Accordingly, the petition for writ of habeas corpus is hereby DENIED, and the stay of execution heretofore entered on April 20, 1979 is hereby DISSOLVED.

[Footnotes begin on next page.]

[1]The petitioner is totally without proof that he suffered any prejudice from the failure to instruct the jury on the elements of robbery. At every stage of the proceedings in the case he admitted that he had robbed and murdered Edward A. Nassar. He first confessed to the F.B.I. in Little Rock, Arkansas; next to the Mobile County Grand Jury that returned the indictment against him; then he admitted the robbery-murder at arraignment; and his final confession was before the jury during his trial.

[2]The Court is aware of no less than two other grounds upon which habeas relief for the failure to instruct the jury on robbery is due to be denied. First, alluded to in the text, supra, is the fact that the trial judge's error can at worst be characterized as harmless, since the inclusion of such an instruction would not, under the circumstances, have resulted in any different result. Where an error in a state court proceeding is harmless beyond a reasonable doubt, federal habeas corpus relief is not available. E.g., Milton v. Wainwright, 407 U.S. 371, 377-78, 92 S. Ct. 2174, 33 L. Ed. 2d 1, 6-7 (1972); Washington v. Maggio, 540 F. 2d 1256, 1257 (5th Cir. 1976). Since the failure to instruct can only be characterized as harmless beyond a reasonable doubt, habeas corpus relief is due to be denied.

A second, independent, additional reason for denying habeas corpus relief for the failure to instruct on the elements of robbery results from the fact that the conviction was predicated not only on a jury verdict, but also upon a voluntarily made informed guilty plea by the petitioner. Accordingly, the conviction attacked here is not just the

result of the jury's deliberations, but additionally is the result of informed conduct on the part of the petitioner. The fact that the matter was subsequently tried to a jury resulted not from a rejection of the guilty plea by the trial court, but rather from Alabama practice of submitting all capital cases to a jury, regardless of what plea is entered. See Prothro v. State, 370 So. 2d 740 (Ala. Cr. App. 1979). Having pled guilty to the charges, the petitioner is thereby estopped to challenge the validity of the conviction on other than jurisdictional grounds. See, e.g., Richardson v. Beto, 472 F. 2d 169 (5th Cir. 1973).

[3]The specified crimes are "[k]idnapping for ransom or attempts thereof when the victim is intentionally killed by defendant," Ala. Code, § 13-11-2(a)(1), "[r]obbery or attempts thereof when the victim is intentionally killed by the defendant," id., § 13-11-2(a)(2), "[r]ape when the victim is intentionally killed by the defendant," id., § 13-11-2(a)(3), "carnal knowledge of a girl under 12 years of age, or abuse of such girl in an attempt to have carnal knowledge, when the victim is intentionally killed by the defendant," id., "[n]ighttime burglary of an occupied dwelling when any of the occupants is intentionally killed by the defendant," id., § 13-11-2(a)(4), "[i]ndecent molestation of, or an attempt to indecently molest, a child under the age of 16 years, when the child victim is intentionally killed by the defendant," id., § 13-11-2(a)(8), and "[m]urder in the first degree committed while the defendant is engaged or participating in the act of unlawfully assuming control of any aircraft by use of threats or force

with intent to obtain any valuable consideration for the release of said aircraft or any passenger or crewman thereon, or to direct the route or movement of said aircraft, or otherwise exert control over said aircraft," id., § 13-11-2(a)(12).

[4]Id., § 13-11-2(a)(5).

[5]Id., § 13-11-2(a)(6).

[6]Id., § 13-11-2(a)(7).

[7]Id., § 13-11-2(a)(9). The specified public buildings are set out in section 13-2-61.

[8]Id., § 13-11-2(a)(10).

[9]Id., § 13-11-2(a)(11).

[10]Id., § 13-11-2(a)(13).

[11]Id., § 13-11-2(a)(14).

[12]Section 13-11-6 provides that:

Aggravating circumstances shall be the following:

(1) The capital felony was committed by a person under a sentence of imprisonment;

(2) The defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person;

(3) The defendant knowingly created a great risk of death to many persons;

(4) The capital felony was committed while the defendant was engaged in or was an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempt to commit, rape, robbery, burglary, or kidnapping for ransom;

(5) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

(6) The capital felony was committed for pecuniary gain;

(7) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws; or

(8) The capital felony was espeically heinous, atrocious, or cruel.

Section 13-11-7 provides that:

Mitigating circumstances shall be the following:

(1) The defendant has no significant history of prior criminal activity;

(2) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to the act;

(4) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor;

(5) The defendant acted under extreme duress or under the substantial domination of another person;

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and

(7) The age of the defendant at the time of the crime.

[13]Since the 1972 Furman decision thirty-five states and the United States Government have redrafted death penalty legislation. England, Capital Punishment in the Light of Constitutional Evolution: An Analysis of Distinctions Between Furman and Gregg, 52 Notre Dame Lawyer 596, 601 (1977).

[14]The only problem that the Court ascertains in this area is the practice in state courts in capital cases of not instructing the jury of their right to mistry the case. Since the statute

specifically sets forth this possibility, it is probably the better practice that juries be so instructed. However, this Court is not persuaded that the failure to so instruct is constitutionally infirm.

[15]The North Carolina statute provided that:

> Murder in the first and second degree defined; punishment.—A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, kidnapping, burglary, or other felony, shall be deemed to be murder in the first degree and shall be punished with death. All other kinds of murder shall be deemed murder in the second degree, and shall be punished by imprisonment for a term of not less than two years nor more than life imprisonment in the State's prison.

N.C. Gen. Stat. § 14-17 (Cum. Supp. 1975), quoted from Woodson v. North Carolina, 428 U.S. 280, 286, 96 S. Ct. 2978, 49 L. Ed. 2d 944, 950 (1976).

[16]The Roberts plurality decision contrasted the North Carolina and Louisiana statutes:

> There are two major differences between the Louisiana and North

> Carolina statutes governing first-degree murder cases. First, the crime of first-degree murder in North Carolina includes any willful, deliberate, and premeditated homicide and any felony murder, whereas Louisiana limits first degree murder to five categories of homicide—killing in connection with the commission of certain felonies; killing of a fireman or a peace officer in the performance of his duties; killing for remuneration; killing with the intent to inflict harm on more than one person; and killing by a person with a prior murder conviction or under a current life sentence. Second, Louisiana employs a unique system of responsive verdicts under which the jury in every first-degree murder case must be instructed on the crimes of first-degree murder, second-degree murder, and manslaughter and must be provided with the verdicts of guilty, guilty of second-degree murder, guilty of manslaughter, and not guilty. . . . [b]y contrast, in North Carolina instructions on lesser included offenses must have a basis in the evidence adduced at trial.

Roberts v. Louisiana, 428 U.S. 325, 331-32, 96 S. Ct. 3001, 3005, 49 L. Ed. 2d 974, 981 (1976) (Footnote and citation omitted).

[17]The Court also considered the Alabama sentencing authority in light of Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978), and Bell v.

Ohio, 438 U.S. 637, 98 S. Ct. 2977, 57 L. Ed. 2d 1010 (1978), and finds no problem with the Alabama statute. The Ohio statute, much like the mandatory North Carolina and Louisiana statutes, precluded consideration by the sentencing authority of the particularized aspects of the defendants' character and record, and the particularized aspects of the crime itself. As noted in the text, supra, section 13-11-3, which requires a pre-sentence hearing, avoids this problem.

[18]This is precisely the rationale adopted by the Florida Supreme Court in State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973):

> The aggravating circumstances of Fla. Stat. § 921.141(6) [sic], F.S.A., actually define those crimes—when read in conjunction with Fla. Stat. §§ 782.04(1) and 794.01(1), F.S.A. —to which the death penalty is applicable in the absence of mitigating circumstances. As such, they must be proved beyond a reasonable doubt before being considered by judge or jury.

This Court notes that the aggravating circumstances set out by the Florida Statute, Fla. Stat. § 921.141(5), are with a minor exception, identical to those set out in the Alabama Statute, Ala. Code, § 13-11-6.

[19]The stipulation between the parties reflects that there have been 22 cases under the statute in which the defendant received life imprisonment without parole. Thirteen of these sentences were the result

of guilty pleas, while the other nine defendants were convicted at trial after a not guilty plea. In seven of the nine cases the state actively sought the death sentence, but in each of those cases the jury-imposed death sentence was reduced to life imprisonment without parole. Those seven cases were handled by four different trial judges.

[20]Even if the Court concluded that the Alabama process did run afoul of Lockett, it is unlikely that such a finding would be of any benefit to the petitioner. This is true because the record is clear that in the petitioner's case the trial court actually did consider a mitigating circumstance not enumerated in the statute in reaching its decision on punishment. Evans v. State, 361 So. 2d 654, 664 (Ala. Cr. App. 1977). Certainly the trial judge here was not encumbered by any Lockett-condemned considerations.

[21]In Dixon, the Florida Supreme Court defined its own function in reviewing death penalty cases:

> Review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case. No longer will one man die and another live on the basis of race, or a woman live and a man die on the basis of sex. If a defendant is sentenced to die, this Court can review that case in light of the other decisions

and determine whether or not the punishment is too great.

State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973).

[22]In case of a conviction and imposition of life imprisonment without parole, the appeal is not automatic but rather must be pressed by the defendant. See, e.g., Neal v. State, 372 So. 2d 1331 (Ala. Cr. App. 1979).

[23]The Florida statute had previously been upheld in Proffitt.

APPENDIX J

TITLE 28, UNITED STATES CODE, SECTION 2254

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by an available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or

the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing

in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:
And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant,

otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall

produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.